OCTOBER TERM, 1900.

No. 217.

WM. P. H. McFADDIN, ET AL, PLAINTIFFS IN ERROR,

vs.

EVANS-SNIDER-BUELL CO., ET AL, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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Phoenix Printing Co., Muskogee.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 520.

WILLIAM H. McFADDEN, in his own right, W. P. McFADDEN and JAMES McFADDEN, Executors of William McFadden, Deceased ..... *Plaintiffs in Error,*

vs.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. SPAULDING, et al ..... *Defendants in Error.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

The defendants in error have recently filed an additional brief in this case which gives us an opportunity to reply to it and some other matters in their original brief which we did not have the time to do when we originally submitted the case on printed briefs.

There is a slight mistake in the statement on page 7 of our brief, as the record shows that all of the cattle were located in the Indian Territory, and were so located when one of the deeds was recorded in the State of Texas. The defendant in error has thought of nothing apparently since this case was inaugurated except the herculean task of overthrowing the decision of *Main vs. Alexander, 9 Ark., 112*, and of vainly attempting to try this case by the decision in *Byers vs. Engles, 16 Ark., 543*. Now let us see the two statutes construed in those cases, and put them in parallel columns:

The statute construed in *Main vs. Alexander* is as follows:

"All mortgages, whether for real or personal estate, shall be acknowledged before some person authorized by law to take the acknowledgments of deeds, and shall be recorded, if for lands, in the county or counties in which the land lies; and if for personal property, in the county in which the mortgagor resides." * * * "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before, which filing shall be notice to all persons of the existence of such mortgage." —*Rev. Stat., ch. 101, secs. 1 and 2.*

The statute construed in *Byers vs. Engles* is as follows:

"That all instruments affecting the title to real or personal property, whether in law or equity, which are required by law to be recorded, shall from the time the same are filed for record, be constructive notice to all persons."—*Sec. 30, Dig. p. 269.*

"That no deed, bond or instrument of writing, for the conveyance of any real estate, or by which the title thereof may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditory of any person executing such deed, bond, or instrument obtaining a judgment or decree (which by law may be a lien upon such real estate), unless such deed, bond or instrument, duly executed and acknowledged, or proven as it is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated."—*Sec. 31, Digest, p. 269.*

These statutes and their amendments are correctly set out on pages 6, 7 and 8 of the additional brief of the defendants in error. The statute construed in *Main vs. Alexander* was passed by the Arkansas legislature February 20, 1838, and became law by the proclamation of the Governor March 30, 1839. The Act of February 20, 1838, was amended December 19, 1846, by adding

thereto the paragraph construed in *Byers vs. Engles*. The case of *Merrill vs. Dawson*, referred to in brief of defendant in error, did not construe either of the sections above referred to, nor did the case of *Fowler vs. Merrill, 11 How., 375*. This last case, much relied on in the brief of defendants in error, does not support their contention, but on the contrary supports our own. The mortgage in this case was recorded on the 29th day of December, 1837, nearly one year before the State of Arkansas had a law touching mortgages and the recording of the same. The law permitting and giving effect to the recording of mortgages was passed in 1839 and the suit which was brought attacking the mortgage was instituted on the 7th day of September, 1842. The judgment which this suit was brought to enforce was obtained on the 12th day of March, 1841. The deed then in question was on record at the time a law was passed permitting the recording of deeds, and the court held that that answered the purpese, and inasmuch as the judgment was not gotten for something like a year thereafter, the mortgage was duly recorded under a proper law and therefore could not be attacked. Notice what the court says upon this point:

"There is another view of this transaction, which, if necessary to revert to, would probably sustain this present mortgage. The Arkansas law to make a mortgage valid if recorded passed February 20, 1838, (Rev. Stat., p. 580). This mortgage was on record then, and since, and had been from December, 1837, thus covering the time when the law took effect * and when the respondents purchased. It was also acknowledged then, and though not before a magistrate in Arkansas, yet before one in Mississippi; and in most states the acknowledgment may be before a magistrate out of the state as well as in, if he is authorized to take acknowledgments of such instruments.

"Nothing appears in the record here against his power to do this."

At the time that case arose an at the time it was decided in the lower court the statute construed in *Byers vs. Engles* had not

been enacted and the court held that the deed was properly recorded before it was attacked under the statutes construed in *Main vs. Alexander*. Again, that mortgage was taken when there was nothing but the common law prevailing in Arkansas and was relied on at that time, so that the question of notice and *bona fides* might have been brought into the case but for the subsequent passage of the recording act, and would have been decided under rules prevailing under the common law and previous to passage of the recording act.

Main vs. Alexander has been approved in the following cases decided in the State of Arkansas, and has never at any time been adversely criticised:

Merrick vs. Avery, 14 Ark., 388.
Hannah vs. Carrington, 18 Ark., 105.
Jacoways vs. Gault, 20 Ark., 193.
Watson vs. Thompson, 49 Ark., 85.
Cross vs. Fombey, 54 Ark., 184.
Leach vs. Fowler, 22 Ark., 142.
Jarrett vs. McDaniel, 32 Ark., 602.
Neal vs. Speighly, 33 Ark., 68.
Martin vs. O'Bannon, 35 Ark., 68.
Mitchell vs. Wade, 39 Ark., 385.
Dodd vs. Poke, 40 Ark., 540.
Martin vs. Ogden, 41 Ark., 192.
Wright vs. Graham, 42 Ark., 148.
Hawkins vs. Files, 51 Ark., 419.
Chapman vs. Chapman, 55 Ark., 544.

The case was attacked very soon after it was rendered in *Merrick vs. Avery, 14 Ark., 388*, and the court had occasion to review its former decision, if deemed incorrect. It has been at-

tacked several times since, but the court has always held, and properly so, that the peculiarity of the language of the statute construed warranted the decision and warranted no other construction.

In *Martin vs. O'Bannon, 35 Ark., page 68*, the court uses thi language:

"This court has repeatedly declined to depart from the decision in *Main vs. Alexander, 9 Ark., 112*, which was founded upon the strong and *peculiar* language of the mortgage statute, and became a rule of property, that an unrecorded mortgage is not a lien against strangers, though they have actual knowledge of its existence."

In referring to the case again, in *Martin vs. Ogden, 41 Ark., 191*, we find the following:

"Upon the other hand, it is as much closed from question that an unrecorded mortgage, however honestly made, is wholly invalid against attaching creditors, or persons obtaining a specific lien, or even subsequent purchasers who take with the full knowledge that they are defeating another's lien, and who intended to do so."

It will be seen that the statute construed in *Byers vs. Engles* use the express language that "actual notice" shall be equivalent to record notice. This statute was not adopted and put in force in the Indian Territory and does not affect this case any more than the decision construing it.

The defendants in error have also cited another recent case from Arkansas which they claim sustains their position, but which we claim, if it has any bearing on the case whatever, sustains ours. It is the case of *Steers vs. Kinsey, 58 S. W. Rep., 1050.*

The mortgage in this case was executed and recorded in October, 1889. On the 10th day of December, 1890, the attachment suits were begun. After that time and before judgment in the attachment suits, to-wit: on March 11, 1891, the State of

Arkansas passed an act validating the defects in the deed of 1889. The attachment was sustained March 29, 1892. Of course all this time the attachment was an inchoate lien, and prior to the time it was sustained liable to be defeated by a repeal of the law or the passage of any retroactive legislation. The court in fact lays down the further doctrine that we contend for in this language:

"The statute cured defects in the acknowledgment of the mortgage, and gave it, except as to persons having acquired vested rights in the land before the passage of the acts, the same force and effect it would have had had it been properly acknowledged in the first instance. The only question that remains, then, is whether the parties who brought the attachment suits acquired vested rights in the lands by the bringing of the suits and the levy upon the lands."

It will be seen that the point made is simply whether the institution and levy, not judgment, in the attachment case constituted a vested right. Had the attachments been sustained and the lien perfected prior to the passage of the curative statute, the court would certainly have rendered no such decision.

We have never made any allegations or reference in this case as to fraud other than that which the law absolutely infers from the production in evidence of a muniment of title, an unrecorded mortgage. We do not have to allege fraud of any kind. The statute under which we proceed doesn't require it. This proceeding was under sections 390 and 391 of *Mansfield's Digest of the Laws of Arkansas*. This statute requires that the party claiming the property shall make oath that it is his property and shall give a bond "that he will prosecute such interpleader of attachment without delay, and if on the trial of such interpleader the property shall be found to be the property of the defendant in such writ, and the plaintiff shall recover judgment against the defendant, the property shall be delivered to said sheriff," etc. The interpleader

filed its affidavit on the 12th day of December, 1896. The formal interplea was filed on the 27th day of January, 1897.

This interplea recites the levy of the attachment and raises the issue that the property was not subject to levy as the property of J. R. Blocker.

The answer to the interplea asserts the fact that it was the property of J. R. Blocker at the time of and liable to the levy. The controversy therefore was one as to who had the best lien on the property. If there had been no objection at all to the introduction of the written instrument when the plaintiff introduced the attachment proceedings against the defendants' deed, the plaintiffs were entitled to the peremptory instruction asked for at the close of the testimony and the lower court committed an error in not sustaining said motion.

Under the chattel mortgage act in force in the Indian Territory the recording of the mortgage is as essential to its validity as against third persons as any other element entering into the making of a valid chattel mortgage. It is a valid lien only from the time of its being filed for record even as against purchasers and creditors with actual notice. The registration of a mortgage under our law operates as constructive notice, only when the statute authorizes its registration and only to the extent of those provisions which are within the registration statute.

Blatchford vs. Boyden, 122 Ill., 657.
Parroski vs. Goldberg, 50 N. W., 191.
Waller vs. Rossman, 45 Mich., 333.
Sidener vs. Bible, 43 Indiana, 230.

We do not have to allege or prove fraud, because the case is settled when the priority of liens was settled, as under our statute

fraud is an absolute inference of law which cannot be rebutted or explained by evidence showing the transaction fair and honest.

II. Cobbey on Chattel Mortgages, sections 614 to 616.

Jewell vs. Simpson, 16 Pac. Rep., 450.

When one claims title under a mortgage and it shows on its face that it was not legally recorded, then the only way to rebut the inference of fraud is to show a change of possession, and the burden is on the party asserting title under a mortgage to show the changing of possession or some other fact if such there is to take the case out of the statute.

I. Cobbey on Chattel Mortgages, sections 497–574.

Blatchford vs. Boyden, Supra.

McCarthy vs. Grace, 23 Minn., 182.

Where the mortgage fixes the residence of the party, the location of the property, and who retains the possession it is conclusive unless particularly attacked or proven otherwise by the party claiming under it.

II. Cobbey on Chattel Mortgages, section 574.

It is contended by the defendant in error that because plaintiff was a non-resident of the state that the law did not apply to him and that he stood as though there was no law on the subject. But that is not true for the question has been passed upon several times and decided that where the mortgagor resides out of the state he must take possession of the property in order to make his mortgage valid. In addition to cases formerly cited, see:

II. Cobbey on Chattel Mortgages, section 578.

Dillingham vs. Bolt, 37 New York, 198.

On the question as to the distinction between creditors and purchasers in this kind of a case, in addition to the authorities

cited in our former brief we desire to call attention to *II Cobbey on Chattel Mortgages, section 606*. Much was said in the majority opinion of the Court of Appeals as well as in the brief of the defendant in error about the equities of this case, and it was urged that the fact that defendants' money had gone into these cattle should weigh greatly in deciding a case. We desire to answer that proposition by quoting from the case of *Blatchford vs. Boyden Supra*, a very able decision from the Supreme Court of Illinois:

"The fact that the mortgage is for the purchase money, or the intention of the parties that it is to be secured thereby, can give no vitality to the lien on the mortgage. As against third persons, creditors, or purchasers, a chattel mortgage lien can be preserved only in two ways: by the mortgagee retaining possession of the property, or by the recording of a properly executed and acknowledged chattel mortgage providing that the possession of the chattels shall remain with the mortgagor."

In none of the cases where such chattel mortgages have been attacked has fraud ever been alleged or its allegation required. The objection was simply made to the instrument because it did not comply with the statutory requirement and as against third persons no title ever passed through any such instrument. The issue in cases like this between the plaintiff and defendant and those arising on the interplea are in one sense distinct but they are not foreign to each other.

It must be admitted by anybody that the only question, as before stated, to be tried was the title to the property, and if no title passed by the defective mortgage, as it could not under our statutes, to the interpleader the plaintiff's perfected attachment lien was bound to prevail, because he had the higher title and the only title recognized by law.

Respectfully submitted,

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